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Supreme Court, U.S.
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No. 97-458

In The

Supreme Court of the United States

October Term, 1997

Lakeland Lounge of Jackson, Inc.,

Petitioner,

v.

City of Jackson, Mississippi,

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a municipalities' adult entertainment ordinance that regulates the exposure of female breasts, but not male breasts, violates the Equal Protection Clause.

2. Whether this court will grant certiorari to review the judgment of a state Supreme Court on a constitutional issue not previously raised by petitioner, and not dispositive of the case.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all the parties to the proceedings. There is no parent or subsidiary company to be listed pursuant to S. Ct. R. 29.6; however, Lakeland Lounge is d/b/a Danny's at 1925 Lakeland Drive, Jackson, MS, which is the subject of this litigation.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Statement of the Case 2

Reasons for Denying the Petition 5

I. The Mississippi Supreme Court's ruling is consistent with case law established by the U.S. Supreme Court and Federal Courts 6

II. Petitioner has failed to previously raise this constitutional issue 8

III. The equal protection issue was not dispositive of this cause 9

Conclusion 9

TABLE OF AUTHORITIES

Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S. Ct. 2456, 115 L.Ed. 2d 504 (1991) 6

City of Jackson, Miss. v. Lakeland Lounge, 147 F.R.D. 122 (S.D. Miss. 1993) 1,4

City of Jackson, Miss. v. Lakeland Lounge of Jackson, Inc., 800 F. Supp. 455, 458 (S.D. Miss. 1992) 3

City of Jackson, Miss. v. Lakeland Lounge, 800 F.Supp. 459-60, 467-68 (S.D. Miss. 1992) 1,3

City of Jackson, Mississippi v. Lakeland Lounge of Jackson, Inc., 688 So.2d 742, (Miss. 1996) 5

Hang On, Inc. V. City of Arlington, 65 F.3d 1248 (5th Cir. 1995) 7

Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss., 507 U.S. 1030, 113 S. Ct. 1845, 123 L.Ed. 2d 469 (1993) 1,4

Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss., 800 F.Supp. 455 (S.D. Miss 1992) 1

Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss., 973 F.2d 1255 (5th Cir. 1992) 8

Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss., 973 F.2d 1257; 800 F.Supp. 459 (5th Cir. 1992). 1,3

Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss., 979 F.2d 211 (5th Cir. 1992) 1,4

Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed 2d 1090 (1982) 7,8

SDJ, Inc. vs. City of Houston, 837 F.2d 1268 (5th Cir1988). 7

The People of the State of New York v. David, 152 Misc. 2d 66, 585 N.Y.S. 2d (1991)..... 7

Tolbert v. City of Memphis, Tenn., 568 F.Supp.1285 (W.D.Tenn. 1983) 6,7

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The City of Jackson, Mississippi, respectfully files this its brief in opposition to Lakeland Lounge, Inc.'s petition for a writ of certiorari to review the judgment of the Supreme Court of Mississippi in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi is reported at 688 So.2d 742. The opinion of the Hinds County Chancery Court was rendered on July 9, 1993, and is unreported; however, it is contained in the appendix of petitioner's petition at App. 36.

This case also has been before the federal courts. See: ***Lakeland Lounge of Jackson, Inc. v City of Jackson, Miss.***, 800 F. Supp. 455 (S.D. Miss. 1992); ***City of Jackson, Miss. v. Lakeland Lounge of Jackson, Inc.***, 800 F. Supp. 459-60, 467-68; ***Lakeland Lounge v. City of Jackson, Miss.***, 973 F.2d 1255 (5th Cir. 1992); ***Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss.***, 979 F.2d 211 (5th Cir. 1992); the United States Supreme Court denied writ of certiorari in ***Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss.***, 507 U.S. 1030, 113 S. Ct. 1845, 123 L.Ed. 2d 469 (1993); and ***City of Jackson, Miss. v. Lakeland Lounge of Jackson, Inc.***, 147 F.R.D. 122 (S.D. Miss. 1993).

STATEMENT OF THE CASE

On January 28, 1992, the City of Jackson, Mississippi (the "City"), amended its existing Zoning Ordinance (R.Exhibit 1) to regulate and disperse adult entertainment businesses in the City, by requiring that these businesses locate in I-1 Light Industrial Zoning Districts and some areas of the Central Business District, with a use permit. Existing businesses were given three (3) years to comply. This amendment, the "adult entertainment ordinance," also regulated and defined the type of adult entertainment that may be conducted in these districts.

The Petitioner, Lakeland Lounge of Jackson, Inc. ("Lakeland") was incorporated in January, 1992 for the purpose of operating a restaurant/lounge with adult entertainment in the form of topless dancing in an area not zoned properly under the new ordinance. Lakeland sought various license/permits which were denied by the City, therefore, on February 20, 1992, Lakeland began litigation against the City. This case has been before the Federal District Court of the Southern District of Mississippi on three occasions and before the Fifth Circuit Court of Appeals.

The Mississippi Supreme Court provided the following facts in tracing the history of this cause:

On February 27, 1992, Lakeland sued the City in United States District Court under cause number J92-0123(B). Lakeland sought to have the ordinance declared unconstitutional and its enforcement enjoined. The district court denied Lakeland's motion for temporary restraining order; however, on April 30, 1992, Judge Barbour declared the ordinance unconstitutional and permanently enjoined its enforcement.

Judge Barbour found the City had nothing to support its assertion that adult entertainment establishments have negative or detrimental secondary effects on the surrounding community. The City appealed to the Fifth Circuit for a motion to stay Judge Barbour's opinion. ***Lakeland Lounge***, 973 F.2d at 1257; 800 F.Supp. at 459.

On May 6, 1992, Lakeland opened for business. On May 13, 1992, the City filed a complaint in Hinds County Chancery Court charging that Lakeland was operating in violation of the building code. Lakeland filed for removal to the federal court based on a federal question. Upon removal to federal court, cause no. J92-0283(W), Lakeland filed a counterclaim and motion for injunctive relief to prohibit the City from continuing a pattern and course of conduct which interferes with the free exercise of a right protected by the First Amendment of the United States Constitution. Judge Wingate found that the City's refusal to issue permits violated protected speech. However, since the case was predicated upon the constitutionality of the zoning ordinance, and the constitutionality of the ordinance was pending in the Fifth Circuit from cause no. J92-0123(B), Judge Wingate determined to stay the instant holding in the case until the Fifth Circuit ruled on the City's motion to stay. ***City of Jackson,*** 800 F.Supp. at 459-60, 467-68.

On October 5, 1992, the United States Court of Appeals for the Fifth Circuit reversed Judge Barbour's ruling and found that the zoning amendment was constitutional. ***Lakeland Lounge v. City of Jackson, Miss.,*** 973 F.2d 1255 (5th Cir. 1992). In short, the Fifth Circuit concluded that "the Jackson City Council properly considered the secondary effects of adult business and provided sufficient alternative avenues of expression for them." ***Id.,*** at 1260. On November 4, 1992, the

Fifth Circuit denied Lakeland's petition for rehearing. ***Lakeland Lounge v. City of Jackson, Miss.,*** 979 F.2d 211 (5th Cir. 1992). On April 19, 1993, the United States Supreme Court denied *writ of certiorari*. ***Lakeland Lounge v. City of Jackson, Miss.,*** 507 U.S. 1030, 113 S.Ct. 1845, 123 L.Ed.2d 469 (1993).

As a result of the Fifth Circuit's ruling that the City's Ordinance was constitutional, the City filed a complaint against Lakeland in Hinds Chancery Court cause no. 150,720 seeking injunctive relief preventing Lakeland from doing business in the form of topless dancing at that location, which is in violation of the City's Zoning Ordinance.

On December 21, 1992, Lakeland filed for a removal of the action to the United States District Court for the Southern District of Mississippi, alleging federal question jurisdiction. The City made a motion to remand to Hinds County Chancery Court. On March 8, 1993, United States Magistrate Nicols granted the City's motion for remand. The federal court clerk sent a certified copy of the order to the clerk of the state court. ***City of Jackson, Miss. v. Lakeland Lounge,*** 147 F.R.D. 122 (S.D. Miss. 1993).

On April 1, 1993, Judge Barbour determined that the federal court no longer had jurisdiction of the case *sub judice*. ***City of Jackson, Miss. v. Lakeland Lounge,*** 147 F.R.D. 122, (S.D. Miss. 1993). Therefore, on April 16, 1993, a hearing was held before Chancellor Dillard on motions for a temporary restraining order, preliminary and permanent injunction, and a citation for contempt. Lakeland contended that the ordinance was vague and ambiguous and therefore unconstitutional since it failed to give notice of the precluded behavior.

Chancellor Dillard held that according to the Fourteenth Amendment to the United States Constitution requiring equal protection, "females have equal rights to expose their breasts to the same extent as would a male." The trial court also concluded that section 202.80(a) Specified Anatomical Areas is "hopelessly and constitutionally ambiguous." (***City of Jackson v. Lakeland Lounge***, 688 So. 2d 742 Miss. 1996).

The City filed a notice of appeal to the Mississippi Supreme Court as a result of the Chancellor's denying the permanent injunction with respect to the City's Adult Entertainment Ordinance. Lakeland failed to file a brief with the Mississippi Supreme Court.

On December 12, 1996, the Supreme Court of Mississippi in the ***City of Jackson, Mississippi v. Lakeland Lounge of Jackson, Inc.***, 688 So.2d 742, (Miss. 1996) reversed and rendered finding that (1) the ordinance defining "specified anatomical areas" was not unconstitutionally vague; (2) the club's challenge to the constitutionality of the ordinance was barred under the doctrine of res judicata; (3) the trial court lacked authority to determine whether the ordinance violated the equal protection clause; and (4) the ordinance did not violate the equal protection clause by regulating exposure of female breasts but not male breasts.

Lakeland now requests this court to grant a writ of certiorari as to the equal protection question.

REASONS FOR DENYING THIS PETITION

The decision of the Mississippi Supreme Court is appropriate and consistent with the numerous rulings of this

court and the federal courts. Secondly, petitioner should be prohibited from raising this issue the first time by petition for writ of certiorari. Further, the constitutional issue petitioner is requesting that this court review was not dispositive of this case and will not affect the outcome.

I. THE MISSISSIPPI SUPREME COURT'S RULING IS CONSISTENT WITH CASE LAW ESTABLISHED BY THE U.S. SUPREME COURT AND FEDERAL COURTS.

The Mississippi Supreme Court properly found that the City of Jackson's Adult Entertainment Ordinance did not violate the Equal Protection Clause by prohibiting females from exposing their breasts, but not males in certain districts.

The Court stated in part as follows:

> "The United States Supreme Court has determined that regulation of nude and female topless dancing does not violate the United States Constitution. See ***Barnes v. Glen Theatre, Inc.***, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504(1991). The federal courts have addressed the Equal Protection Clause issue in connection with state ordinances which regulate adult entertainment by restricting the exposure of females' breasts, but not males' breasts. ***Tolbert v. City of Memphis, Tenn.***, 568 F. Supp. 1285 (W.D. Tenn. 1983), held that restricting the exposure of female breasts did not violate the Equal Protection Clause.

> The court reasoned, "In our culture, for the purpose of this type of ordinance, female breasts are a justifiable basis for a gender-based classification." ***Tolbert***, 568 F. Supp. At 1290; *see generally* ***Mississippi University for Women***, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed. 2d 1090 (1982).
>
> Finally, the Fifth Circuit, on at least two occasions, has upheld adult entertainment ordinances that regulate exposure of female breasts, but not male breasts, challenged under the Equal Protection Clause. ***SDJ, Inc. v. City of Houston***, 837 F.2d 1268 (5th Cir. 1988); ***Hang On, Inc. v City of Arlington***, 65 F.3d 1248 (5th Cir. 1995). In both cases, the Fifth Circuit held that regulation of female breasts, but not male breasts, was substantially related to the City's interest in regulation."

Clearly, based on the above case law, properly cited by the Mississippi Supreme Court, as well as widespread adult entertainment and nudity ordinances which have been upheld with similar language, the City's ordinance is not violating the Constitution. This is not a novel question of first impression by this court as urged by petitioner. This court spoke directly on the issue in ***Barnes v. Glen Theatre***, supra. Further, the fact that petitioner found one State Supreme Court in ***The People of the State of New York v. David***, 152 Misc. 2d 66, 585 N.Y.S. 2d (1991) that found differently based on different facts, is of no consequence.

Petitioner also argues that the Miss. Supreme Court did not properly apply this court's ruling in ***Mississippi University for Women v. Hogan***, supra. Yet, the court only said "see generally". And indeed the outcome was based on sound reasoning and case law consistently established by this court.

II. PETITIONER HAS FAILED TO PREVIOUSLY RAISE THIS CONSTITUTIONAL ISSUE.

Lakeland originally chose its own forum and challenged the City's ordinance in the U.S. District Court for the Southern District of Mississippi, wherein the defendant attacked the constitutionality of the ordinance. The United States Court of Appeals for the Fifth Circuit in its decision, ***Lakeland, Inc. v. City of Jackson, Mississippi***, supra, upheld the constitutionality of the ordinance, and properly refused to grant Lakeland an injunction to prohibit the enforcement of the Ordinance. The District Court remanded the cause to Chancery Court where the City was attempting enforcement of the Ordinance. Upon remand, the federal court stated that it had already determined the ordinance to be constitutional, and the state courts should enforce its provisions. However, upon the City's attempt to enforce the ordinance by obtaining a permanent injunction in Chancery Court, Lakeland raised a new challenge on the grounds that the ordinance was void for vagueness. In its opinion and judgment denying the City a permanent injunction to enforce the ordinance, the Chancery Court found a separate constitutional issue, which had not been plead or argued by either party to this action, and determined that the ordinance violated the Fourteenth Amendment to the U.S. Constitution requiring equal protection, because females have an equal right to expose their breasts. (App. 24) Upon appeal to the Miss. Supreme Court Lakeland did not even file a brief. (App.12)

Therefore, this court should not allow or hear this argument raised by Lakeland the first time by writ of certiorari.

III. THE EQUAL PROTECTION ISSUE WAS NOT DISPOSITIVE OF THIS CAUSE.

The Mississippi Supreme Court reversed the Chancellor's decision in this cause refusing to grant an injunction to enforce the City's Ordinance holding the constitutional challenges to the ordinance were precluded under the doctrine of *res judicata* because Lakeland had already had its day in court and failed to make said challenges; and because a trial judge may only rule on issues pleaded before the court; therefore, the chancellor erred by going outside the scope of pleadings by determining that females have the same right as males in exposing breasts. (App. 28)

Clearly, the Court's ruling on the equal protection issue raised by the Chancellor, sua sponte, was dictum, and a reversal by this court on that issue as now urged by petitioner would not effect the outcome of the Court's ruling.

CONCLUSION

For these reasons, the Respondent requests that this Petition be denied.

Respectfully submitted,

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